FILED
JUN 27 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 210

GEORGE DEWEY STONEKING,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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June 23, 1956.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, George Dewey Stoneking, prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Eighth Circuit, to review the judgment of that Court in Cause No. 15417, wherein that Court affirmed the judgment of the District Court for the Western District of Missouri, convicting the petitioner of violation of Sections 2113 and 371, Title 18, United States Code, for robbery of the Citizens Bank of Carl Junction, Missouri.

OPINIONS BELOW.

The opinions below appear:

1. The opinion of the Court below is not officially reported. It is printed in the appendix hereto, page 9.

JURISDICTION.

The judgment of the Court below was entered April 24, 1956. Order denying motion for rehearing was made on May 28, 1956. The mandate was issued June 7, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Did the opinion of the Court of Appeals prejudicially ignore the decision of this court in Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698, and the conflicting opinions in Billeci v. United States, 184 F. 2d 394, from District of Columbia Circuit, and United States v. Morzano, 149 F. 2d 923, from the Second Circuit, all relating to the restraint imposed upon the contents of instructions in criminal cases?

2. Was the opinion below in conflict with the opinions of other circuits in Freed v. U. S., 266 F. 1012; Freedmon v. U. S., 274 F. 603; West v. U. S., 113 F. 2d 68; Lett v. U. S., 15 F. 2d 686; Graham v. U. S., 15 F. 2d 740, relating to the propriety of instructing concerning the weight to be given to the testimony of accomplices?

STATUTES INVOLVED.

The principal statutory provisions involved are Title 18, U. S. C., Sections 2113 and 371; said sections are set out in the appendix, pages 25 to 27.

STATEMENT OF CASE.

The petitioner herein was tried for robbery of the Carl Junction, Missouri, Bank on February 18, 1955, such bank being insured by Federal Deposit Insurance Corporation. The two other participants, Courtright and Vaughan plead

guilty, were awaiting sentence, and testified for the Government in petitioner's trial.

The evidence in brief showed that the three men went in two cars from their homes in Webb City to a point several miles from Carl Junction and there left Vaughan with one car. The two others drove to the Carl Junction Bank, and while petitioner remained outside in one car, Courtright entered the bank about 12:25 P. M., showed a gun to a cashier and had delivered to him $1683.25. Courtright entered the petitioner's car, drove to meet Vaughan, entered the Vaughan car and returned to Webb City. Both cars were followed and within two hours the three men were arrested.

Stoneking's defense consisted of testimony from alibi witnesses that he was at Webb City Library at 11:45 A. M., again at 12:35 to 12:40 P. M. and was paying a utilities bill shortly after 1:00 P. M.

Stoneking was found guilty by the jury and was sentenced to sentences of seven years and three years to be served consecutively.

Appeal was taken to the Eighth Circuit principally on the ground that the trial court's charge was prejudicial and that the court had failed to instruct on the caution with which testimony of accomplices should be received.

REASONS FOR GRANTING THE WRIT.

The Court should grant the writ because:

1. The decision of the court below is contrary to and in conflict with the decision of the District of Columbia Circuit in Billeci v. United States, 184 F. 2d 394, and with the decision of the Second Circuit in the United States v. Marzano, 149 F. 2d 923, and with the decision of the Supreme Court in Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698.

In the Billeci case the judgment of the District Court was reversed where the trial court had given a long charge commenting upon the evidence. The Court pointed out there are constitutional lines across which he cannot go, that he cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether, that he cannot be argumentative, nor an advocate. "These principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the Court." l. c. 403. The Billeci opinion ended on the note that he must make it unequivocally clear to the jurors that conclusions upon such matters are theirs, not his, to make, and he must do so in such manner and at such time that the jury will not be left in doubt, and lastly, that references in some remote or obscure portion of a long charge will not suffice for the purpose.

The additional conflicting case is that of Marzano where the trial court called his own witness and, in a sense, took over the role of the prosecutor. The opinion stated:

> "Moreover, even if the jury were not as likely as seems to us to be the case, to have so understood what took place, the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge." Adler v. United States, 5 Cir., 182 F. 464, 472-474; Connley v. United States, 9 Cir., 46 F. 2d 53, 55-56; Frantz v. United States, 6 Cir., 62 F. 2d 737, 739; Williams v. United States v. Minuse, 2 Cir., 114 F. 2d 36, 39.

In Quercia v. United States, 1933, Mr. Chief Justice Hughes wrote the opinion reversing a conviction because instructions of the trial court exceeded the bounds of fair comment and constituted prejudicial error. The trial court went on to attempt to cure the defect by stating: "Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty." l. c. 469.

Further, at l. c. 470 and 472, this court said:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.'" Starr v. United States, 153 U. S. 614, 626, 14 S. Ct. 919, 923, 38 L. Ed. 841; Hickory v. United States, 160 U. S. 408, 421-423, 16 S. Ct. 327, 332, 40 L. Ed. 474.
>
> "Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not

guilty. His definite and concrete assertion of fac
which he had made with all the persuasiveness of judi
cial utterance, as to the basis of his opinion, was no
withdrawn. His characterization of the manner an
testimony of the accused was of a sort most likely t
remain firmly lodged in the memory of the jury and t
excite a prejudice which would preclude a fair and dis
passionate consideration of the evidence."

Recognition is given to the requirement that the charg
(Record 23-25) must be read in its entirety.

The appellate court has correctly stated the propositio
that "if we review only the particular portions of th
charge objected to, fault might be found; . . . (Appendi
page ....). By this statement it is apparent the court be
lieved errror had been found in the instruction. It was s
obviously an error because the testimony of witness Ston
that he identified defendant Stoneking at a point severa
miles from Carl Junction certainly would not alone hav
been sufficient for the case to have gone to the jury (Recor
31-32).

The same argument applies as to the testimony of Rev
erend Bottles having identified Stoneking as he followe
the Ford. On it alone the case could not have been sub
mitted to the jury (Record 32).

Such erroneous charges make immediate and lasting im
pressions upon the minds of jurors, and, once the notio
is implanted with the jurors no amount of further ex
planation can cure the defect.

It is apparent that these portions of the charge woul
not have been contained in a studied written charge. Her
the trial court made statements which in and of them
selves were incurable.

This Court in Costello v. United States, 76 S. Ct. 406, 40
stated as follows:

> "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict."

The improper statements of the trial court reflect disregard for the rule that the court must not direct the verdict of the jury nor state anything tantamount to the same.

2. The additional point is made that the court erred in refusing to give defendant's second requested instruction relating to the weight to be given to the testimony of accomplices (Record 21-22):

> "The Court instructs the jury that the testimony of parties aiding, assisting, encouraging and abetting the crime is admissible; yet their evidence when not corroborated by the testimony of others not implicated in the crime, as to matters material to the issue, ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth, before they should convict the defendant on such testimony."

The opinion of the court is in conflict with the decisions of several other circuits holding that the jury should be instructed regarding the weight to be given to the testimony of accomplices: Freed v. U. S., 266 F. 1012; Freedmon v. U. S., 274 F. 603; West v. U. S., 113 F. 2d 68; Lett v. U. S., 15 F. 2d 686; Graham v. U. S., 15 F. 2d 740.

The trial court desired to give such an instruction and stated in the Supplemental Record at page 2 that he had covered the point on conspiracy. But the true fact is that the trial court failed to so render it. Proof of this statement is contained in a full reading of the charge, wherein no mention of the matter can be found.

The Court below relied upon Caminetti v. United States, 242 U. S. 470, 495, 37 S. Ct. 192, 61 L. Ed. 442. Distinction

is easily drawn between it and the Stoneking case because in Caminetti Mr. Justice Day wrote, at l. c. 495:

> "We agree with the circuit court of appeals that the requests in the form made should not have been given."

In the Stoneking case the trial court wanted to give this proper instruction, but merely forgot to give it in his oral charge. The Eighth Circuit Court of Appeals in no sense indicated that Defendant's Refused Instruction Two should not have been given. Government Counsel has at no time recorded any objection to the substance of the charge. It was improper for the court below under these uncontradicted circumstances to rely upon the rule in the case of United States v. Bucur, 7 Cir. 1952, 194 F. 2d 297, because there the court refused it and did not intend to cover the point otherwise. In the Stoneking case the trial court wanted the jury to have the essence of the instruction but erroneously thought he had given it.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

DANIEL J. LEARY,
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Joplin, Missouri,
Counsel for Petitioner.

June 23, 1956.

APPENDIX.

Opinion of Court of Appeals.

United States Court of Appeals
For the Eighth Circuit.

No. 15,417.

George Dewey Stoneking, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[April 24, 1956.]

Daniel J. Leary for Appellant.

Kenneth C. West, Assistant United States Attorney (Edward L. Scheufler, United States Attorney, was with him on the brief), for Appellee.

Before Stone, Johnsen and Vogel, Circuit Judges.

Vogel, Circuit Judge.

George Dewey Stoneking (appellant herein) and Paul Courtright and Earl Milton Vaughan were jointly indicted for bank robbery and conspiracy. Count No. 1 of the indictment charged that the three defendants on February 18, 1955, robbed the Citizens Bank of Carl Junction, Carl

Junction, Missouri, the deposits of which were insured by the Federal Deposit Insurance Corporation, using force, violence and intimidation, and by putting in jeopardy the lives of bank employees through the use of a dangerous weapon, a .22 caliber pistol, and taking money from the bank, all in violation of Section 2113, Title 18, U. S. C. A.

Count No. 2 charged that between February 1, 1955, and February 18, 1955, the three defendants entered into a conspiracy to rob the bank (18 U. S. C. A., § 371). Count No. 2 set forth five overt acts as implementations of the conspiracy.

Defendants Courtright and Vaughan entered please of guilty to the indictment. Stoneking entered a plea of not guilty, was tried before a jury and convicted. Courtright and Vaughan both testified in behalf of the prosecution at Stoneking's trial. Stoneking appeals to this court.

Viewed in the light most favorable to sustaining the verdict of the jury, **Canton v. United States**, 8 Cir. 1955, 266 F. 2d 313, cert. den. February 27, 1956; **Christianson v. United States**, 8 Cir. 1955, 226 F. 2d 646, cert. den. March 26, 1956, the evidence disclosed the following:

Stoneking, Courtright and Vaughan had known each other for many years. Sometime in February, 1955, the three of them entered into a conspiracy to rob the Citizens Bank of Carl Junction, Missouri. On the morning of February 18, 1955, (a spur of the moment choice for the robbery) Courtright and Vaughan drove into Webb City, Missouri, where Vaughan was dropped off at a bar. Courtright, using Vaughan's car, went to Stoneking's home and asked him if he was ready to rob the bank. Stoneking said he would be in a few minutes. Courtright then drove to Vaughan's home and obtained a pistol which had been given to him by Stoneking the Sunday previous for use in the robbery, coveralls and a cap. He then returned to Stone-

king's house. Shortly thereafter Vaughan picked up Courtright at the bar and met Stoneking in the latter's car near the Webb City Library. Vaughan drove his car with Courtright as a passenger to a point on a gravel road two miles east of Carl Junction, where Courtright entered Stoneking's car and Vaughan's car was turned around. Stoneking drove Courtright to Carl Junction. En route, near the home of one Doris Moss, he stopped, went to the rear of the car and threw some mud over the license plate. The witness, however, did not actually identify Stoneking as the man who threw the mud.

Stoneking then drove Courtright around the block on which the bank was located and parked the car near the bank. Courtright walked into the bank carrying a loaded gun, executed the robbery, the details of which are unnecessary here, came out and got in Stoneking's car, which Stoneking drove east on Highway 57, and thence on to a gravel road where Courtright changed to Vaughan's car, Vaughan having been waiting for them. Courtright and Vaughan drove north on Highway 43, ultimately going to Vaughan's house, where they hid the money under a back porch. Vaughan and Courtright were arrested as they were leaving the house shortly afterward.

The two cars used by the defendants in the robbery and get-away were a light green Ford operated by Stoneking and Vaughan's blue Ford, to which Courtright had transferred after the robbery at the point on the gravel road east of Carl Junction, where Vaughan awaited them. Both cars, first Stoneking's car and then Vaughan's blue car, were followed by witnesses, who subsequently testified that the Stoneking car turned south at the intersection and the Vaughan car north.

Reuben Stone, one such witness, testified to following the cars to the intersection where the one car turned north and the other south. He testified:

"At that point from a distance of 18 to 20 feet I looked right in the eye of the man in the light green car. I identify the man as the defendant Stoneking in the courtroom."

On cross-examination, Mr. Stone testified:

"When the fellow in the old car turned his head around at the intersection of 43 I saw him for a very short time, just a matter of seconds, I would say three seconds. At the preliminary hearing in the Magistrate Court of Jasper County before Judge Ray England I testified that the man turned his face 'for a fraction of a second.' I now recognize the discrepancy in my testimony. I saw the green car at the Webb City Jail on the night of February 18. I remember Mr. Stoneking being present at the preliminary hearing on March 2, 1955."

The Reverend Mr. Keith Bottles was another witness to the identity of the defendant Stoneking. He testified to having followed the Stoneking car and catching up with it traveling at speeds of 80 miles an hour or more. He stated:

"The green car stopped across the street from the front of the library in Webb City, and the man who got out of the green Ford at the library I identify in the court room. The man entered the library and stood outside the doors watching me, then the man went inside the library and I drove to the main part of Webb City and then back to the library, where I saw the green car still parked, and obtained the complete license number, H-33013. Mud had been smeared over the 'H' in the license plate. I had obtained the other digits of the license plates as I chased it across the country. The man left the library and I now know the man to be Dewey Stoneking, got into his Ford and went south, then west with me still following him. * * *"

On cross-examination, Bottles testified:

> "At the intersection of Highway 43 I could not identify Stoneking, but I could identify Vaughan and Courtright, who were three cars ahead of me at that time. At that time it was misting. Courtright and Vaughan were within four or five car lengths ahead of me and as they turned north I could see both of them and identified them. I do not know from whence came the car that got between me and the light green car on the T. B. Hospital road. The green car was always in my vision until we reached the library. I did 80 miles an hour passing the car in front of me."

Richard W. Flack, a Special Agent of the F. B. I. Laboratory in Washington, D. C., testified regarding a scientific analysis and comparison of dirt or soil on the license plate of the Stoneking car and that taken from soil samples near where the car had stopped and someone was observed to have thrown mud on the license plate. Evidence was also introduced whereby the pistol used in the robbery of the bank was traced to the defendant Stoneking.

The appellant's first charge of error deals with the court's instructions to the jury. The more serious is concerned with the court's comments with reference to the witnesses Reuben Stone and the Rev. Mr. Bottles. As to the witness Reuben Stone, the court stated:

> "You heard the witness Reuben Stone, who said that at the intersection of Highway 43 and this gravel road, as the defendant Stoneking looked around over his shoulder—some dispute about whether it was for one, two or three seconds; to my mind that is of no consequence at all—you can determine whether it is or not; I would say, no—he said, 'I looked him right in the eye and that is him.' If you believe that testi-

mony is true, then the defendant Stoneking is guilty on the First Count.

"Now, then, who else? The Reverend Bottles says that he identifies, he recognizes and points out the defendant Stoneking as the driver of the Ford, as he followed the Ford. Now, if you find and believe that testimony is true, then, again, you would find the defendant Stoneking guilty."

Appellant argues that the court's statement was, in effect, a direction to find the defendant guilty solely upon the testimony of the witness Stone that he saw and identified him at the intersection of Highway 43 or upon the identification of the witness Bottles and that it ignores the defendant's testimony regarding an alibi. It should be noted, however, that immediately after instructing the jury as above, the court stated:

"Of course, on each of these Counts, you have to find, however, that he was a principal; that he 'aided, counseled, abetted or induced' the commission of the holdup of the Bank of Carl Junction.

"Is he otherwise identified? You may remember the testimony, of course, of Courtright and of Vaughan. They have pleaded guilty here, but they are witnesses in the case. They have told you in detail all of what happened and what Mr. Stoneking was a member of the group, and what his part in it was.

"The credibility of all of these witnesses, whether you believe them or not, is for you. If you believe them and believe that Stoneking—we are talking about the First Count now—did aid, counsel and abet with Courtright and/or Vaughan to go out to the Bank of Carl Junction to hold it up, and that in furtherance thereof drove his automobile out there, and from this point two and a half miles east of Carl Junction took Courtright with him, and that they did go into Carl Junction for the purpose of having Courtright go into

> the Bank and get the money out of the Bank by the use of firearms—and he did so—and that Stoneking was waiting for him, and when Courtright came out and got in the Stoneking automobile they headed on back toward the east with the money, if you believe that evidence to be true, then you would find the defendant Stoneking guilty."

In considering the effect of a challenged portion of a court's instruction to the jury, this court must view the charge in its entirety to determine whether or not the jury could have been misled by the portions to which objection has been made.

Myers v. United States, 8 Cir., 1927, 18 F. 2d 529, 530. So here, if we view only the particular portions of the charge objected to, fault might be found; but when viewed in the light of the court's remarks which immediately followed the objected-to portions, we find no reason for criticism, and must conclude that the jury was not confused by the instruction and that taken as a whole it was not improper.

In **Hewitt v. United States**, 8 Cir., 1940, 110 F. 2d 1, 10, cert. den. 310 U. S. 641, Judge John Sanborn, speaking for this court and in passing upon a somewhat similar charge by the trial court, stated:

> "The instruction challenged by the defendant did nothing more than advise the jury that if they found the facts to be as testified to by the government's witnesses, the defendant was guilty under the law. That was an accurate and correct statement, and was entirely justified. It did not invade the province of the jury. The credibility of the witnesses and the weight of evidence was left to the jury's determination. Compare **Horning v. District of Columbia**, 254 U. S. 135, 137, 138, 41 S. Ct. 53, 65 L. Ed. 185."

Appellant also complains of other portions of the trial court's charge to the jury wherein the court commented

in detail on the evidence introduced and on some occasions expressed his own opinion in regard thereto. When a trial judge feels it necessary to comment in detail about the evidence introduced in a criminal trial, he must exercise complete fairness and impartiality and avoid in any sense the advocate's right of argument. If a trial court sees fit on the one hand to comment in detail on the evidence introduced by the prosecution, he must, on the other hand, comment in detail with reference to the evidence introduced in behalf of the defense. If he sees fit to express opinions, he must avoid advocacy or argument in such expression and must meticulously point out to the jury that such opinions as he may have expressed are in no way binding upon the jurors and that they are the sole arbiters of all fact questions.

This court stated the rule in **Cook v. United States**, 8 Cir., 1927, 18 F. 2d 50, 52:

> "These cases cannot all be harmonized, but we think the line of demarcation between what a court may say to the jury in a criminal case in expressing his opinion on the facts, and what he may not say, is to be drawn between mere expression of opinion not partaking of such argumentative nature as to amount to advocacy, leaving to the jury absolute freedom to determine the facts, and such discussion as amounts to an argument and makes the court in fact an advocate against the defendant. A trial judge is not merely a moderator or umpire; neither is he an advocate.
>
> "The argumentative nature of the part of the instructions objected to (hereinbefore set out) is apparrent, and in our judgment the language amounted to an argument for the conviction of the defendant. The court did tell the jury that his opinion on the facts was not controlling upon them, but that did not in our judgment cure the error. Every one knows that suggestions from the court have great weight with a jury,

and the argumentative language used in this instruction must have seemed to the jury an advocacy of the government's case, and impressed upon them the court's desire for a conviction. We think it was not such judicial discussion of the evidence as is permissible. Certainly the language is as argumentative as that used by the court in the case of **Cook v. United States** (C. C. A.), 14 F. (2d) 833, which this court decided necessitated a reversal of the case."

See also **Boatright v. United States**, 8 Cir., 1939, 105 F. 2d 737, 740; **Spalitto v. United States**, 8 Cir., 1930, 39 F. 2d 782, 788; **McCoy v. Blakely**, 8 Cir., 1954, 217 F. 2d 227, 233. In this case, the court's remarks did not amount to argument or advocacy, they were fairly stated and not overemphasized on one side or the other. The trial court very carefully left for the jury the determination of all disputed questions of fact. Before his comments on the evidence, he stated:

"What I am about to say, in my review of the evidence before you, is not binding upon you because you are the sole judges of what the evidence was, and if your recollection differs from mine, you, of course, will be governed by your recollection, not mine."

In regard to the defense of an alibi on the part of the defendant, the trial court stated:

"Now, he says it is not so. That is on the First Count. He says it is not so. He says that. He offers winesses here to say that he was in the Library in Webb City, or was paying his water bill.

"Then Mrs. Ferguson was put on the stand. Your recollection of the testimony is what is controlling on that. My recollection of the testimony of Luther Atterbury and his wife is that Mr. Stoneking came there about 11:40 in the morning. That is the first time. He came back later that day when Mrs. Bald-

ridge was there and she fixes the time at about, my notes show, 12:45 p. m. that day.

"I do not see any conflict in the evidence here that would amount to an alibi, because that is corroborated by the testimony of the Reverend Bottles and was consistent, at least, with the time when the Bank holdup occurred. So it is for you to determine whether or not that constitutes an inconsistency with the Government's evidence, or is an alibi."

He then explained further the testimony in behalf of the defendant, again referring to the fact that the question of the truth or falsity of such testimony was for the jury. Continuously through the entire charge the trial court, in reviewing the evidence, referred again and again to the fact that it was up to the jury to determine what the facts were.

At the conclusion of the court's comments with reference to the evidence on both sides and his instructions regarding the law and just before submitting the case to the jury, he stated as follows:

"Now, all these facts are for your determination. I do not mean to assume as true, or established any fact whatever concerning which I have talked about, or to which I have made reference. What I have done is attempt to review the evidence before you for such aid and enlightenment as it can be, and I tried to do it in as an impartial a manner as I know how. The resolution of the questions of fact is all for you."

We have carefully reviewed the entire charge and the objections thereto. We are of the opinion that it fairly presented a summary of the testimony and, while expressing opinion on some evidentiary points, the trial court carefully left for the jury all fact determinations, pointedly making clear that such fact determinations were for

the jury and the jury alone. We find no error in the instructions as given.

Appellant's second point is that the court erred in failing to give the appellant's second requested instruction, which was as follows:

> "The Court instructs the jury that the testimony of parties aiding, assisting, encouraging, and abetting the crime is admissible; yet their evidence when not corroborated by the testimony of others not implicated in the crime, as to matters material to the issue, ought to be received with great caution by the jury, and they ought to be fully satisfied of its truth before they should convict the defendant on such testimony."

On this point the record indicates that, subsequent to the court's general charge to the jury, the following occurred:

> "Mr. Leary (Attorney for appellant): And I think one point, Your Honor, you may have—I cannot say you did or didn't—failed to mention, and that is whether or not the testimony of Courtright and Vaughan needed corroboration. I have forgotten whether you mentioned that or not.
>
> The Court: I mentioned it on conspiracy but only on conspiracy.
>
> Mr. Leary: Well, if you did mention it, all right; if you did not, I would object to the failure to mention it. I have nothing further.
>
> The Court: All right. The objections are noted."

The court had given an adequate instruction covering the credibility of witnesses in general but had failed to give defendant's Requested Instruction No. 2, supra, or refer in any way to the caution with which an accomplice's testimony should be received where it is not corroborated. Appellant relies on a case from this court, **McLendon v. United States**, 8 Cir., 1927, 19 F. 2d 465. Quoting from page 465:

"One of the alleged errors in the trial of the case was that the judge declined to instruct the jury as to the testimony of R. C. Smith, a witness for the United States, as the testimony of an accomplice of the defendant."

Page 466:

"The evidence in this case so strongly tended to prove that this witness Smith was an accessory and an accomplice of the defendant in the conception and commission of the offense alleged in the indictment in this case that we are unable to resist the conclusion that the court's failure to instruct the jury regarding this issue, and its failure to instruct them with what caution they should consider his testimony, if they concluded he was such an accomplice, was an error which deprived the defendant of a substantial right in his trial."

It will be noted, first, that in the **McLendon** case, the witness Smith was not named as a defendant or an accomplice, yet the evidence strongly indicated that he was an accessory before the fact. The jury should have been allowed to determine that issue and instructed that if they found Smith was an accessory before the fact, then, in law, he was an accomplice in relation to his testimony, which should be received with caution where uncorroborated. We have no such situation in the instant case.

Our situation is more comparable to that confronting the court in **United States v. Bucur**, 7 Cir., 1952, 194 F. 2d 297, 305:

"Defendant also argues that the trial court erred in refusing to instruct the jury as to the weight to be assigned to accomplice testimony. Although such an instruction is the 'better practice,' it is not error to refuse to give it. **Caminetti v. United States**, 242 U. S.

470, 495, 37 S. Ct. 192, 61 L. Ed. 442; **Wallace v. United States**, 7 Cir., 243 F. 300. This is particularly true in the light of the fact that the jury was clearly advised that the witness Minich was in fact one of the alleged co-conspirators. Thus, it was proper for the court to allow the jury to draw its own conclusions as to the weight to be assigned to his testimony."

This court stated the general rule in **Greenberg v. United States**, 8 Cir., 1924, 297 F. 45, 47;

> "While it is the better practice in a criminal prosecution to give an instruction cautioning the jury against too much reliance on the testimony of an accomplice, the failure to give such an instruction is not reversible error, and there is no absolute rule of law preventing conviction on such testimony. **Caminetti v. United States**, 242 U. S. 470, 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917 F, 502, Ann. Cas. 1917 B, 1168; **Diggs v. United States**, 220 Fed. 545, 552, 136 C. C. A. 147; **Wagman v. United States** (C. C. A.), 269 Fed. 568, 571; **Wallace v. United States**, 243 Fed. 300, 307, 156 C. C. A. 80; **Richardson v. United States**, 181 Fed. 1, 9, 104 C. C. A. 69; **Rachmil v. United States** (C. C. A.), 288 Fed. 782, 785; **Graboyes v. United States**, 250 Fed. 793, 794, 163 C. C. A. 125; **Tuckerman v. United States** (C. C. A.), 291 Fed. 958, 963; **Reeder v. United States** (C. C. A.), 262 Fed. 36, 42."

Here there could have been no question in the jurors' minds as to the status of the witnesses Courtright and Vaughan. They were named co-defendants in the indictment. They had entered pleas of guilty. They testified as to the conspiracy, the actual robbery of the bank and Stoneking's part therein. As to their testimony, the trial court stated:

> "You may remember the testimony, of course, of Courtright and of Vaughan. They have pleaded guilty here, but they are witnesses in the case. They have

told you in detail all of what happened and that Mr. Stoneking was a member of the group, and what his part in it was.

The credibility of all of these witnesses, whether you believe them or not, is for you. * * *"

There is another, very cogent reason why failure to give defendant's second requested instruction was not error in this particular case. It is, of course, the better practice to give the instruction where the testimony of the accomplices lacks corroboration, but in the instant case we think there was substantial corroboration of the testimony of the two accomplices. We refer to the identifying testimony of the witnesses Stone and Bottles and also to the fact that the gun used in the robbery was traced directly to the defendant Stoneking. The testimony of Courtright and Vaughan regarding their activities before and at the time of the robbery was corroborated in other respects by various witnesses. We find no error in connection with appellant's second point.

Appellant's third point is that the court erred in failing to require the witness Flack to answer directly defense counsel's question as to whether or not the dirt samples did or did not come from the specific area near the Moss home. Referring to the samples, one taken from the license plate on Stoneking's car and the other from the spot where someone picked up soil and threw it on the license plate, the witness testified on direct examination:

"A. I find they could have come from this area represented by the specimens I examined. I would consider it unlikely they came from any other area and I found no differences to indicate that they did."

On cross-examination, the following occurred:

"Q. Now, Mr. Flack, let me ask you a blunt, straight-forward question: did they come from the same area?

A. No. I said that they could have come from that area and that it is unlikely that they came from another area.

Q. I am asking you a straight-forward, blunt, frank question. I am not asking you a probability nor a possibility. I am asking you, as a matter of fact, did they come from that area?

A. I think I answered the question.

Q. Will you answer the question I am asking you, please?

A. Yes, sir.

Q. Did they come from that area?

A. They could have come from that area."

Appellant's counsel then asked the trial court to direct the witness to answer whether or not the samples came from that area. The trial court refused to so direct but asked the witness if he could say whether or not the samples came from the same place. In answer to the Court's question, the witness stated:

"A. If they were different I could say definitely that they did not come from the same area. Since they are alike I can say that they could have come from the same area. Well, due to the various similarities it is unlikely that it came from another area."

We think the trial court was entirely correct in refusing counsel's request and that it would have been improper to direct the witness to answer a question which he obviously could not answer. The witness said that the samples could have come from the same area and that it was unlikely that they came from different areas. He could not, of course, say with definiteness that they did come from the same area. The samples were alike. Had they been different, the witness could have made the definite statement that they did not come from the same area; but being alike, he could only say that they could have come from the same

area and that it was unlikely that they came from different areas. We find no error in the appellant's third point.

An examination of the record, including the court's entime charge, convinces us that the defendant had a fair trial.

Affirmed.

A true copy.

Attest:

(Seal) E. E. Koch,
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15417.

September Term, 1955.

Tuesday, April 24, 1956.

George Dewey Stoneking,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, George Dewey Stoneking, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

April 24, 1956.

Statutes Involved.

Tit. 18, Sec. 2113.

Sec. 2113. Bank robbery and incidental crimes.

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section, the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan associa-

tion and any "insured institution" as defined in Section 401 of the National Housing Act, as amended. As amended Apr. 8, 1952, c. 164, 66 Stat. 46.

Title 18, U. S. C., Sec. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 210

GEORGE DEWEY STONEKING, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 9-24; S.R. 7-22)[1] is reported at 232 F. 2d 385.

JURISDICTION

The judgment of the Court of Appeals (Pet. 24-25; S.R. 23) was entered on April 24, 1956. A petition for rehearing was denied on May 28, 1956 (S.R. 29).

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[1] The record is designated "R."; the supplemental record is designated "S.R."

The petition for a writ of certiorari was filed on June 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's comments on the evidence deprived petitioner of a fair trial.

2. Whether the trial court erred in failing to charge the jury with respect to the weight to be given to testimony of accomplices.

STATUTE INVOLVED

18 U.S.C. 2113 provides in pertinent part:

> *Bank robbery and incidental crimes.*
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

* * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

* * *

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

STATEMENT

In the United States District Court for the Western District of Missouri, petitioner was convicted upon the verdict of a jury (R. 36) under an indictment (R. 1-4) charging armed robbery in February 1955 of a bank in Carl Junction, Missouri, insured by the Federal Deposit Insurance Corporation, and conspiracy to do so. 18 U.S.C. 371, 2113. He was sentenced to a seven-year prison term on the robbery count and a three year term on the conspiracy count, the sentences to run consecutively (R. 36). On appeal, the conviction was affirmed (Pet. 9-24; S.R. 7-22).

The evidence with respect to the issues raised by the petition for a writ of certiorari may be summarized as follows:

Petitioner's two companions in the conspiracy and robbery, Vaughan and Courtright, were the chief government witnesses. Vaughan testified that he was a defendant in the case, had pleaded guilty, and was awaiting sentence. Courtright lived in Vaughan's house in Webb City, Missouri. A few days before the robbery petitioner came to the house and talked to Courtright. On the day of the robbery Vaughan drove downtown with Courtright in Vaughan's dark blue 1947 Ford. Vaughan remained at a bar while Courtright left for an hour. On Courtright's return, they drove west of town on the Carl Junction Road, where Vaughan parked the car headed east (R. 15). Courtright then got into petitioner's light green car and left toward the west with petitioner. After ten or fifteen minutes they returned and Courtright again got into Vaughan's car. Courtright had a sack with him which Vaughan found contained money when they reached Vaughan's house (R. 15).

Courtright testified that he had also entered a plea of guilty and was awaiting sentence. He said that shortly before the robbery he and petitioner had discussed the project in his bedroom at Vaughan's house and he identified government's exhibit 15 as "exactly" like the gun petitioner had furnished him, the Sunday before, for robbing the bank. The plan was for him to rob the bank and for petitioner to wait for him in petitioner's light green car. On the date of the robbery Courtright, using Vaughan's car, went to petitioner's house and asked him if he was ready to rob the bank. Petitioner replied that he would be in a few minutes; Courtright then went home and

ut on coveralls and a cap, obtained the pistol, and eturned to petitioner's house (R. 16-17). Petitioner aited for him near the Webb City Library while e (Courtright) picked up Vaughan at the bar. After stop to buy wine, Vaughan and Courtright drove o a point on a gravel road two miles east of Carl unction, Missouri, where Vaughan turned his car round and parked it facing east. Courtright and etitioner then drove on to Carl Junction in petiioner's green Ford. They stopped near a white house nd petitioner got out of the car for a minute and ame back wiping his hands. In Carl Junction they arked near the bank. Courtright entered the bank vith the gun concealed under his coveralls and told he teller to put the money in a pillow slip which he anded her. Petitioner picked up Courtright outside he bank and they drove east to Vaughan's car. Courtight transferred to Vaughan's car and petitioner drove off to the east ahead of them and disappeared (R. 16-17).

Both Vaughan and Courtright testified that they drove by petitioner's house on the way home from the obbery but did not see his car there (R. 15, 17). Vaughan said that he put the pistol in his dresser drawer when he got home and that it resembled government's exhibit 15 (R. 15). Courtright said that petitioner told him he had traded a rifle for the pistol (R. 18). The pistol was found at Vaughan's home (R. 12, 13) and was identified by its former owners as the one which had been traded to petitioner (R. 14).

Reuben Stone testified that he saw a man run out of the bank; that a light green Ford car crossed the

intersection and appeared about to hit the running man; that the man ran out of his line of vision and he did not know whether the man entered the car. Mrs. Wells ran out of the bank and told Stone that it had been robbed, and Stone and a newspaper editor (one Miller) jumped into Mrs. Wells' car and followed the green Ford. A "preacher" also gave chase, following the Wells' car.[2] Stone said that they overtook the green Ford and an older model blue Ford about 2½ miles out of town. At the intersection of Highway 43 the blue car turned north and the green car south. At that point Stone "looked right in the eye" of the driver of the green car from a distance of about 18 or 20 feet. He identified the driver as petitioner. He then followed the blue car into Webb City, and in it he observed the man he had seen run out of the bank and another man. The blue car stopped near a farm house and Stone stopped 200 feet back. Reverend Bottles and a policeman soon approached (R. 7). The two occupants of the blue car, Courtright and Vaughan, entered the house and were arrested as they emerged a little later (R. 8). On cross-examination, Stone admitted a discrepancy in his testimony at a preliminary hearing in that he then had described the time during which he saw the face of one of the men as a fraction of a second.

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[2] Miller testified that the green car got out of sight during the time he and Stone were getting under way; that at the intersection of Highway 57 a salesman who was parked there (R. 6) told them that the green car had continued on over the hill; that a short time later they overtook the green car, which was following an old model blue car (R. 8, 9).

whereas at the trial he estimated this time as "a matter of seconds, I would say three seconds" (R. 8).

Reverend Bottles testified that on being told of the robbery by Mrs. Wells he followed Stone in his car; that at Highway 57 Stone talked with a man and then continued east; that there was a blue Ford in front, then a two-tone green car, then Stone's car; and that at Highway 43 all cars stopped for the stop sign. At that point Stone went north after the blue car and Reverend Bottles followed the green car south at speeds up to 80 miles per hour into Webb City, where it stopped in front of the library (R. 9-10). He identified the driver of the green car as petitioner. He then drove around town and back to the library and found the green car still parked there. Mud had been smeared on the license plate but he had obtained all but one letter of the number during the pursuit. He followed the car again when it left the library, until petitioner parked in a driveway on a dead end street. Reverend Bottles then notified the police (R. 10).

In his instructions to the jury the trial judge said (R. 31-32):

> You heard the witness Reuben Stone, who said that at the intersection of Highway 43 and this gravel road, as the defendant Stoneking looked around over his shoulder—some dispute about whether it was for one, two, or three seconds; to my mind that is of no consequence at all—you can determine whether it is or not; I would say, no—he said, "I looked him right in the eye and that is him." If you believe that testimony is

true, then the defendant Stoneking is guilty on the First Count.

Now, then, who else? The Reverend Bottles says that he identifies, he recognizes and points out the defendant Stoneking as the driver of the Ford, as he followed the Ford. Now, if you find and believe that testimony is true, then, again, you would find the defendant Stoneking guilty.

Of course, on each of these Counts you have to find, however, that he was a principal; that he "aided, counseled, abetted or induced" the commission of the holdup of the Bank of Carl Junction.

Is he otherwise identified? You may remember the testimony, of course, of Courtright and of Vaughan. They have pleaded guilty here, but they are witnesses in the case. They have told you in detail all of what happened and that Mr. Stoneking was a member of the group, and what his part in it was.

The credibility of all of these witnesses, whether you believe them or not, is for you. If you believe them and believe that Stoneking—we are talking about the First Count now—did aid, counsel and abet with Courtright and/or Vaughan to go out to the Bank of Carl Junction to hold it up, and that in furtherance thereof drove his automobile out there, and from this point two and a half miles east of Carl Junction took Courtright with him, and that they did go into Carl Junction for the purpose of having Courtright go into the Bank and get the money out of the Bank by the use of the firearms—and he did so—and that Stoneking was waiting for him, and when Courtright came out and got into the Stone-

king automobile they headed on back toward the east with the money, if you believe that evidence to be true, they you would find the defendant Stoneking guilty.

In discussion of the charge after its completion, petitioner's counsel objected to the comment that to the court's mind the discrepancy in Stone's testimony concerning the length of time during which he observed petitioner at the highway intersection was of no consequence (S.R. 1). Petitioner did not object to the court's further statement, though he raises the point in his petition here (Pet. 6), that if the jury believed Stone's and Reverend Bottle's testimony with respect to their identification of petitioner they should find him guilty.

Petitioner's counsel also stated (S.R. 2) that, if the judge had failed to discuss in his charge the subject of corroboration of the accomplice testimony of Vaughan and Courtright, he desired to object to the omission of such an instruction. The judge stated that he had mentioned it in connection with the conspiracy "but only on conspiracy" (S.R. 2). Actually, the court's charge (R. 23-35) contained no discussion with respect to the weight of accomplice testimony. Petitioner's counsel had submitted an instruction that uncorroborated testimony of accomplices ought to be received with great caution, which the court denied insofar as not included in the charge as given (R. 22).

ARGUMENT

1. (a). Petitioner objects (Pet. 6) to the fact that the trial judge, in discussing in his instructions the

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aided, counseled, abetted or induced'
of the holdup of the Bank of Carl
then adverted to the testimony of
ourtright, stating that the "credibility
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ou" (*supra,* p. 8). Reading the
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s concerning this testimony of Stone
ottles were not, as petitioner contends,
an instruction that the jury should
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of that independent eyewitness testi-

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charge though the record shows ample
him to have done so (S.R. 2). *Boyd*
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(b). The cou
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Pet. 3-6), were clearly fair comment
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little importance in the discrepancy
s testimony at the preliminary hear-
timony at the trial with respect to the
sed time occurring during his momen-
n of petitioner at the intersection was

not improper and could not have been prejudicial in the context of the charge as a whole, especially since Stone was positive in his identification and the judge immediately told the jury they could determine whether the length of time Stone had an opportunity to observe petitioner was important (*supra*, p. 7). The comment to the effect that petitioner's alibi evidence was, to the judge's recollection, not inconsistent from a time standpoint with his having taken part in the robbery was certainly a fair analysis of the evidence.

2. There was no error in the trial judge's failure to give an instruction that uncorroborated testimony of accomplices should be received with great caution. It is settled that while it is the better practice to give such an instruction in a case of uncorroborated accomplice testimony, it is not reversible error to omit it. *Caminetti* v. *United States*, 242 U.S. 470, 495; (Pet. 20-21). Moreover, this case is not one of uncorroborated accomplice testimony. The weapon used in the robbery was traced directly to petitioner (*supra* pp. 4, 5) and the witnesses Stone and Reverend Bottles both identified him. In addition, as noted by the Court of Appeals, there could have been no doubt in the jurors' minds as to the status of petitioner's accomplices. Each stated at the outset of his testimony that he had pleaded guilty and was awaiting sentence, and the judge expressly referred to their having pleaded guilty (*supra*, p. 8). See *United States* v. *Bucur*, 194 F. 2d 297 (C.A. 7).

CONCLUSION

The decision below is clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

OSCAR H. DAVIS,
Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

ROBERT S. ERDAHL,
JOSEPH A. BARRY,
Attorneys.

JULY 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE 1956—393365/P.O. 89